lants ought to have known that they were liable to tax because the six sailings were undoubtedly on a regular basis. The appellants should have filed their tax returns and exercised their option within the period laid down in section 35(3)(d). The appellants not only failed to give the required notice but also failed to file their income tax returns which fact could be construed as an attempt to evade payment of income tax. The raising of late assessments was due entirely to the fault of the appellants in failing to file their tax returns. If the appellants' business activities in Singapore had not come to the knowledge of the comptroller in November 1967, the appellants, a Hong Kong company, would have got away without paying any tax at all. Under the circumstances the comptroller was in my opinion right in not acceding to the request of the appellants to be allowed to opt under section 35(3)(d) of the Ordinance. Furthermore, the appellants having failed to give the required notice in due time, they lost their statutory right under section 35(3)(d) to require that their statutory income both for the second year and the third year shall be the income of the respective years of assessment. In the circumstances, the comptroller in my opinion, had no discretion to allow the appellants to opt notwithstanding that they had failed to give the required notice within time. Nor has the court any such discretionary power under the Ordinance. In my opinion section 35(3)(d) of the Ordinance was properly construed and applied in this case by the Comptroller of Income Tax.

For the above reasons the appeal fails and is therefore dismissed.

Appeal dismissed.

Solicitors: *Rodyk & Davidson.*

MALAYSIAN REPORTS

KARUPPIAH v. PETALING GARDEN CO. SDN. BHD.

[A.C.J. (Mohamed Azmi J.) June 16 1971]

[Kuala Lumpur — Civil Appeal No. 4 of 1971]

Contract — Housing development — Booking fee for plot in building estate — Whether earnest money — Compensation — Contracts (Malay States) Ordinance, 1950, s. 75.

The plaintiff had paid a sum of $4,000 as deposit for a plot of land in a building estate. Subsequently the defendants asked the plaintiff to sign the agreement for sale but he did not do so. The plaintiff claimed a refund of the sum of $4,000. His claim was dismissed in the sessions court and he appealed to the High Court.

Held: (1) the deposit of $4,000 in this case was earnest money and therefore as the appellant was unwilling to enter into the main contract to complete the bargain, he could not claim a refund of the deposit;

(2) even if the $4,000 was not earnest money, the respondent was entitled to reasonable compensation under section 75 of the Contracts (Malay States) Ordinance, 1950

Cases referred to:-

(1) *Jagathesan* v. *Linggi Plantation Ltd.* [1969] 2 M.L.J. 253.

(2) *Ford* v. *Beech* (1848) 11 Q.B. 852, 856.

(3) *Shree Hanuman Cotton Mills & Anor.* v. *Tata Air Craft Ltd.* A.I.R. 1970 S.C. 1986 at p. 1997.

(4) *Fateh Chand* v. *Balkishnan Das* A.I.R. 1963 S.C. 1405.

(5) *Chiranjit Singh* v. *Har Swarup* A.I.R. 1926 P.C. 1.

(6) *Maula Bux* v. *Union of India* A.I.R. 1970 S.C. 1955.

(7) *Murlidhar Chaterjee* v. *International Film Co. Ltd.* A.I.R. 1943 P.C. 34.

CIVIL APPEAL.

V. K. Palasuntharam for the appellant.

Liew Meng Teck for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an appeal against the decision of the sessions court at Kuala Lumpur whereby the appellant's claim for the refund of $4,000 by way of deposit to the respondent company was dismissed with costs.

The following facts appear to be not in dispute. The respondent, a housing developing company, was the registered proprietor of a large piece of land comprised in Grant 5595 Lot 695 in the District of Kuala Lumpur. The company intended to develop the whole of the said land into a building estate known as "Happy Garden" Petaling Jaya, and by 1964 it had obtained approval for sub-division of the said land into housing lots in accordance with an approved layout plan. Although separate documents of titles to each of the sub-divided lots had not been issued by the State Government, the company proceeded to receive applications from the public to purchase the sub-divided lots as the company developed the land by phases and built houses thereon of varying types. On July 13, 1964 the appellant applied to purchase one of the sub-divided lots *viz.* Lot No. 459 with type "B" house in Phase IV, at the price of $49,720 sub-

ject to the conditions of sale printed on the reverse of the application form, which the appellant agreed to abide. In accordance with condition 5 of the conditions of sale, the appellant paid a deposit of $4,000 and thereby his application to purchase was accepted by the respondent. On May 12, 1965, *i.e.* about ten months after the appellant's booking was accepted, the respondent wrote a letter informing him that the agreements for the sale of the said property were ready and requesting him to call at their solicitors' office for execution of the agreements and at the same time to pay $12,720 for the land which was approximately 6,360 square feet in area together with the usual legal and stamp fees. There being no reply, the respondent sent a reminder dated August 16, 1965 wherein they again made the same request as contained in the first letter. Again, there was no reply, and finally on February 26, 1966 pursuant to conditions 6, 8 and 9 of the conditions of sale, the respondent's solicitors wrote to the appellant in which he was notified that, unless he called at their office to execute the sale agreements and make the necessary payments within seven days of the receipt of the notice, the respondent would cancel his booking of the property and forfeit the deposit of $4,000. There was no response from the appellant until March 30, 1966, when the appellant for the first time through his solicitors demanded for the return of his deposit on the ground that no proper agreement had been concluded and also on the ground of delay allegedly committed by the respondent. After that, the appellant appeared to have lost interest in the matter until about four years later when another letter dated April 17, 1970 was sent to the respondent wherein the respondent was informed that legal proceedings would be taken against the company unless the money was refunded.

The first issue to be considered in this case is whether there was a concluded contract between the parties. If there was a legally binding contract, the next issue to be decided is whether the appellant is entitled to the refund of his $4,000 paid to the respondent.

On the first issue, in deciding whether the transaction that took place on July 13, 1964 formed a legally binding contract between the parties, the following judgment of Ong C.J. in the Federal Court case of *Jagathesan* v. *Linggi Plantations Ltd.*[1] at page 256 is instructive:

"...I think it is of first importance to consider the proper construction of the provisions under which the deposits were paid to the respondents and purported to be forfeited by them. The cardinal rule of construction of the terms of a written agreement is to discover therefrom the intention of the parties to such agreement. They are presumed to have intended what they said."

The learned Chief Justice then went on to quote the judgment of Parke B. in *Ford* v. *Beech*: [2]

"The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent."

Having considered the document dated July 13, 1964 as a whole, I have come to the same conclusion as the learned president of the sessions court that the parties had made a concluded contract, albeit a minor contract with the intention to execute a major contract. To my mind, the transaction in effect constituted a contract for the booking of one of the sub-divided lots as shown in the approved layout plan mentioned in condition 4. The application is an offer by the appellant to book one of the sub-divided lots and the acceptance by the respondent is subject to a condition that the appellant should pay a sum of $4,000. Once the money was paid by the appellant and the payment was accepted — as was the case here — the particular lot which the appellant intended to purchase was thereby reserved for him and the respondent was precluded from accepting a higher offer from a buyer for so long as the appellant was prepared to perform his part of the bargain.

Having decided that there was a completed contract in this case, the next issue is to consider whether the appellant is entitled to a refund of his money. It should be noted at the outset that this was the only sum paid by the appellant in the whole transaction. In my view, the second issue depends on whether on the proper construction of the agreement, the sum of $4,000 can be said to be earnest money as evidencing an intention on the part of the purchaser to buy the property. If it was earnest money, then the sum would not be refundable. Thus, in the case of *Shree Hanuman Cotton Mills & Another* v. *Tata Air Craft Ltd.*[3] where Vaidialingam J. in explaining the decision of the Supreme Court in *Fateh Chand* v. *Balkishnan Das*,[4] said:

"...This court had to consider, in the said decision, two questions: (i) whether the plaintiff therein was entitled to forfeit a sum of Rs. 1,000 paid as earnest money on default committed by the buyer; and (ii) whether the plaintiff was further entitled to forfeit the entire sum of Rs. 24,000 paid by the buyer under the contract which recognised such right. This court held that the plaintiff was entitled to forfeit the sum of Rs. 1,000 paid as earnest money, when default was committed by the buyer. But, regarding the second item of Rs. 24,000 this court held that the same cannot be treated as earnest and therefore the rights of the parties would have to be adjudged under section 74 of the Contract Act."

As stated by Suffian F.J. in *Jagathesan's* case, *ante*, at page 262:

"The law both in India and in England seems to be this, that where earnest money is paid by an intending purchaser of property there is thereby constituted a contract within a contract, there is, as it were, a minor contract within the main contract. The main contract relates to the whole transaction consisting of payments and leading ultimately to completion. The minor contract within this main contract is an agreement that the buyer is to pay something to show that he is in earnest about his bargain and that, while it is true that if the bargain goes through this payment is to go towards the purchase price, it is to be forfeited if the bargain falls through. There is nothing unfair to the buyer in this arrangement because once the agreement has been made and the seller has accepted payment of the earnest money the seller is precluded from accepting a higher offer from another buyer; the seller is held to his bargain even on a rising market for so long as the buyer is prepared to perform his part of the bargain. And to determine whether the money paid is earnest money or not, one must look at the agreement concerned."

In the present case, although the document is silent as to whether the deposit was paid as earnest money, I am of the view that having regard to the nature of the agreement (it being a minor contract within a main contract which is yet to be executed), it is the intention of the parties that the $4,000 should be treated as earnest money. Condition 5 provides that "the required deposit has to be paid on the acceptance of this application"; and condition 6 makes it clear that "the deposit cannot be withdrawn or refunded and shall be forfeited to the company on the applicant's failure to proceed with the proposed purchase". In the instant case, there is no stipulation that the amount paid by the appellant is in the form of a pre-determined liquidated damages or should be forfeited to account for damages for breach of contract. In *Jagathesan's* case at page 257 where the money was paid "by way of deposit and part payment", the following observation was made by Ong C.J.:

"Clause 5 not only failed, again, to distinguish between deposit and part payment, but went further than providing merely that the sum named shall be forfeited."

In the present case, however, the money is never referred to as part payment although, had the main contract been executed, the amount would become part of the purchase price. As provided by Lord Shaw in the Privy Council case of *Chiranjit Singh* v. *Har Swarup*: [5]

"Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

Under the circumstances, I hold that the deposit of $4,000 was paid as earnest money.

In the present case, I am satisfied from the evidence that it was the appellant who was unwilling to enter into the main contract to complete the bargain. Although the respondent had first written to him on May 12, 1965 followed by two other letters, the appellant made no reply till March 30, 1966 in which he, for the first time, complained of undue delay by the respondent and demanded a refund of his deposit. Counsel for the appellant, however, argued before me that the appellant was dissatisfied with the terms of the proposed agreements which the respondent had requested him to execute. At all relevant times prior to the trial, the appellant had never seen the two proposed agreements. Therefore, I think it is reasonable to infer that the appellant's refusal to perform his part of the bargain was not due to his alleged dissatisfaction with the terms of the proposed agreements, but must have been due to financial difficulties or other reasons.

If I am wrong in concluding that the $4,000 was earnest money, I think the respondent is still entitled under section 75 of our Contracts (Malay States) Ordinance, 1950 to reasonable compensation not exceeding the sum of $4,000 (whether or not actual loss or damage is proved to have been caused) even if the stipulation as to forfeiture is held to be in the nature of a penalty. (See *Fateh Chand* v. *Balkishnan Das*, *ante*, and *Maula Bux* v. *Union of India*[6]). In the latter case, Shah Ag. C.J. had this to say at page 1959 paragraph 7:

"Forfeiture of earnest money under a contract for sale of property — movable or immovable — if the amount is reasonable does not fall within Section 74. That has been decided in several cases: *AIR 1926 P.C.1; Roshan Lal* v. *Delhi Cloth and General Mills Co. Ltd., Delhi,* (1911) ILR 33 All 166; *Muhammad Habibullah* v. *Muhammad Shafi,* ILR 41 All 324 = (AIR 1919 All 265); *Bishan Chand* v. *Radha Kishan Das,* (1897) ILR 19 All 489. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

Further, in *Jagathesan's* case, following the judgment of the Privy Council in *Murlidhar Chaterjee* v. *International Film Co. Ltd.*[7] it was held that section 65 of our Contracts (Malay States) Ordinance entitled the defendant/purchaser to restitution subject to a set-off for any damage which the aggrieved vendor had sustained. In the instant case, it is not in dispute that on July 13, 1964 the appellant agreed to purchase the property at the price of $49,720. According to the evidence of P.W.1 as corroborated by Exhibit D6, the property was sold to another buyer on June 19, 1968 at the price of $42,200. The respondent had, therefore, sustained a loss of $7,520. Under the circumstances, I am of the view that the respondent is entitled to set-off the $4,000 as damages under section 65 or, alternatively, to retain it as reasonable compensation under section 75 of the Ordinance.

This appeal is, therefore, dismissed with costs

Appeal dismissed.

Solicitors: *V. K. Palasuntharam; Chung & Huang.*

YONG BOOK FONG v. NALLAKARUPPAN CHETTIAR & ORS.

[O.C.J. (Mohamed Azmi) June 18, 1971]

[Kuala Lumpur — Civil Suit No. 813 of 1969]

Contract — Reimbursement of money paid by plaintiff to third person — Whether plaintiff interested in payment of money — When time begins to run — Limitation — Contracts (Malay States) Ordinance, 1950, s. 70.

The plaintiff gave an interest-free loan of $7,000 to the defendants and another person. He had raised the sum by borrowing the money from a Chettiar firm on the security of land belonging to him. The defendants had agreed to pay the interest on this loan. The defendants failed to pay the monthly interest and as a result the plaintiff had to pay the loan together with interest. He claimed reimbursement of the sum paid by him.

Held: (1) the plaintiff was a person interested in the payment of the money within the meaning of section 70 of the Contracts (Malay States) Ordinance, 1950 and, as a result of the defendant's failure to carry out their legal obligations, it was in the plaintiff's interest to pay off the loan in order to save his land from being foreclosed;

(2) the cause of action in this case under section 70 only arose when the plaintiff paid off the loan to the Chettiar